NO. 22505

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT ALLEN FRENCH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

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APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

I

JURISDICTION

On July 27, 1964, Appellant entered pleas of guilty to three counts of a nine-count criminal indictment charging Appellant with nine separate violations of Title 18, United States Code, Section 2113(a). On August 25, 1964, the Honorable Albert Lee Stephens, United States District Judge for the Central District of California, sentenced Appellant to imprisonment for 17 years and 300 days on each of the three counts, sentence to begin and run concurrently.

On April 1, 1966, Appellant filed a motion to vacate his sentence, pursuant to Title 28, United States Code, Section 2255. Appellant alleged that after he was taken into custody he requested

to be permitted to consult with his counsel, but his requests were ignored. He claimed that during the interrogation which then followed he made self-incriminating statements. He also asserted that his pleas of guilty were based upon a Government agent's promise that he would receive a sentence of ten (10) years or less if he would plead guilty [C. T. 2]. 1/ A full hearing on the motion, at which Appellant was present and represented by counsel, was held before Judge Stephens on May 23 and 24, 1967. On June 15, 1967, Judge Stephens, by minute order, denied Appellant's motion [C. T. 179] and on June 30, 1967, entered Findings of Fact, Conclusions of Law and Judgment to that effect [C. T. 180].

On June 16, 1967, Appellant, by letter, requested a "New Trial or Rehearing". 2/ The request was denied by Judge Stephens on June 30, 1967. 3/ On July 10, 1967, Appellant filed a Motion for New Trial, pursuant to Rule 59(a) and (e) of the Federal Rules of Civil Procedure, seeking to re-open the hearing to permit Appellant to present additional evidence or, in the alternative, to have the judgment vacated and his sentence set aside [C. T. 222]. On July 31, 1967, Judge Stephens entered an order denying this motion [C. T. 236]. Notice of Appeal was filed by Appellant on

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1/ "C. T." refers to Clerk's Transcript.

2/ See C. T. 236.

3/ Ibid.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]
[illegible]
[illegible]

September 7, 1967 [C. T. 269]. [4] Leave to appeal in forma pauperis was granted by this Court on January 5, 1968. [5]

The District Court had jurisdiction of the motion, pursuant to Title 28, United States Code, Section 2255. This Court has jurisdiction on this appeal pursuant to Title 28, United States Code, Sections 1291 and 1915.

II

STATUTE INVOLVED

Title 28, United States Code, Section 2255, provides as follows:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

---

[4] Appellant's counsel had initially filed a Notice of Appeal on July 10, 1967 [C. T. 210]; however, Appellant notified the Clerk of the Court that he wanted the notice withdrawn and it was struck from the file on July 27, 1967 [C. T. 216 and 218].

[5] Appellant's request to appeal in forma pauperis had previously been denied by Judge Stephens on August 30, 1967 [C. T. 239].

September 7, 1967 [C. T. 269]. [4] Leave to appeal in forma pauperis was granted by this Court on January 5, 1968. [5]

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[5] Appellant's request to appeal in forma pauperis had previously been denied by Judge Stephens on August 30, 1967 [C. T. 239].

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

" . . .

" . . .

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus."

III

STATEMENT OF FACTS

Appellant was arrested on June 30, 1964, by Special Agents of the Federal Bureau of Investigation and taken before a United States Commissioner where he was arraigned on a complaint with one count, a violation of Title 18, United States Code, Section 2113(a) [C. T. 168]. Appellant was then taken to the Police Administration Building, booked and held as a federal prisoner [C. T. 168].

On either July 1, or July 3, 1964, [6/] Appellant was interrogated by two members of the Los Angeles Police Department and Special Agent Robert H. Morneau of the Federal Bureau of Investigation [R. T. (2) 63]. [7/] During the interrogation, Appellant confessed to the commission of a number of bank robberies [R. T. (2) 67]. A tape recording of this interrogation was made, but, in August 1965, following an established procedure, the tape was erased [C. T. 168].

On July 20, 1964, Appellant appeared before Judge Stephens but at the request of Appellant's retained counsel the proceedings were continued until July 27, 1964 [C. T. 168]. On July 27, 1964, Appellant, with retained counsel, Richard P. Byrne, again appeared

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[6/] The parties stipulated that the exact date was in dispute [C. T. 168].

[7/] "R. T. (2)" refers to Reporter's Transcript of the Hearing of Appellant's 2255 motion on May 23 and 24, 1967.

before Judge Stephens and entered pleas of guilty to three of the nine counts of the indictment against him.

As previously noted, Appellant filed a motion to vacate his sentence on April 1, 1966 [C. T. 2]. Thereafter, beginning in June 1966, Judge Stephens held a number of pretrial conferences, at which Appellant was present and was represented by court-appointed counsel, Jack A. Dahlstrum, in an attempt to classify all the claims that Appellant wished to present at the hearing as a basis for any relief. 8/ On March 28, 1967, Appellant, acting in propria persona, served fifty-five requests for admissions upon Appellee [C. T. 119]. Appellee failed to answer within the time specified by Appellant. 9/ On May 17, 1967, Appellant filed

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8/ See R. T. (1), Reporter's Transcript of pretrial conferences held on June 20th and August 15, 1966, and January 11th and February 2, 1967.

9/ Appellee's failure to answer was based, partially, on the ground that the requests came from Appellant rather than from his counsel. Counsel for Appellant had indicated in February 1967 that he would file interrogatories and requests for admissions with appellee in February, 1967:

> "THE COURT: . . . So how soon can you get your interrogatories? Can you get those by, say, the 17th of February?
>
> "MR. DAHLSTRUM (counsel for Appellant): I will.
>
> "THE COURT: All right. Any interrogatories and requests for admission? (emphasis added).
>
> "MR. DAHLSTRUM: Served and filed by February 17th?
>
> "THE COURT: Yes, we don't have any hearing on that date. That's just the date for filing.

(Continued)

a Motion for Summary Judgment on the basis that Appellee had, by its failure to answer Appellant's requests for admissions, admitted the matters contained in the requests [C. T. 160]. Judge Stephens denied the motion, [10] and Appellant, counsel for Appellant and counsel for Appellee then stipulated that Appellee would admit seven of the requests but would deny or object to the others [C. T. 168].

Judge Stephens entered a Pretrial Conference Order and Stipulation on May 23, 1967 [C. T. 168] stating that all matters which might affect the validity of the criminal judgment against Appellant would be considered at the hearing on Appellant's motion to vacate his sentence and that Appellant would have the burden of proof on all issues. Appellant raised six issues of law or fact that might affect the validity of the judgment:

1. Were the pleas of guilty of petitioner in the criminal proceeding, voluntarily made and free from coercion and/or wrongful inducement?

a. Was petitioner's right to counsel violated by the interrogation conducted in the Police Administration Building on either July 1 or July 3, 1964, said date being in dispute, and

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[9] Continued:

"MR. DAHLSTRUM: Yes, I understand." [R. T. (1) 69].

[10] The motion was denied by a Minute Order entered on May 17 or 18, 1967 [C. T. 162 and 163]. On October 30, 1967, Judge Stephens, in a memorandum order denying Appellant's application to appeal in forma pauperis, set forth in detail the basis for his denial of Appellant's motion.

were his pleas of guilty influenced or induced thereby?

b. Were any promises made to petitioner by Special Agent Robert H. Morneau, Jr., which influenced or induced petitioner to plead guilty?

c. Was there a threat made to petitioner at the time of his pleas of guilty by Assistant United States Attorney Michael Balaban, such as to have coerced petitioner to enter pleas of guilty?

d. Was petitioner's right to remain silent violated during interrogation by law enforcement officers while petitioner was in custody? If petitioner's right to remain silent was violated during such interrogation, were the pleas of guilty induced or influenced thereby?

2. Is the sentence based upon a pre-sentence report which is so erroneous as to render the sentence invalid as being a lack of due process of law?

3. Was petitioner mentally competent, i. e., able to understand the nature of the proceedings against him and to cooperate with counsel in his defense at all stages of the criminal proceeding?

4. Was petitioner adequately represented by counsel at all stages of the criminal proceeding?

5. Were petitioner's pleas of guilty induced by a combination of inducements, or of inducements and coercion, or of inducements, coercion and inability to understand the proceedings against him and to cooperate and assist his counsel, or of all

of these and the inadequacy of counsel?

6. If petitioner's right to remain silent, right to be represented by counsel, or right to due process has been violated, did this preclude the Court from having jurisdiction to accept petitioner's pleas of guilty [C. T. 168]?

IV

SPECIFICATION OF ERRORS

Four questions emerge from the argument presented in Appellant's opening brief:

1. Did the trial court err in denying Appellant's motion to deem the matters contained in his request for admissions admitted for failure to answer?
2. Did Appellant sustain his burden of proving that his pleas of guilty were induced by promises of leniency by a Government Agent?
3. Did Appellant sustain his burden of proving that his pleas of guilty were induced by the existence of an illegally obtained self-incriminating statement?
4. Did Appellant sustain his burden of proving any of the other contentions he raised in the trial court?

V

ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO DEEM THE MATTERS CONTAINED IN APPELLANT'S REQUEST FOR ADMISSIONS ADMITTED.

1. RULE 36 OF THE FEDERAL RULES OF CIVIL PROCEDURE IS NOT APPLICABLE TO PROCEEDINGS BROUGHT PURSUANT TO TITLE 28, UNITED STATES CODE, SECTION 2255, AND APPELLEE WAS NOT OBLIGATED TO REPLY TO THE REQUESTS.

A motion under Section 2255 is, in reality, comparable in all respects to a plea which, prior to the effective date of Section 2255, traditionally would have been in habeas corpus. Appellant's rights are no greater, or less, than they would have been if he had proceeded in habeas corpus. See _Hill_ v. _United States_, 368 U.S. 424, 427 (1962). It is, therefore, necessary to determine whether Rule 36 is applicable in proceedings brought in habeas corpus. Rule 81(a)(2) expressly provides that the Federal Rules of Civil Procedure are not applicable to habeas corpus proceedings, other than on appeal, unless they come within the statutory exception clause of that rule. This principle was succinctly stated in _Burleson_ v. _United States_, 205 F. Supp. 331 (W.D. Mo. 1962), _rev'd other grounds_, 340 F. 2d 387 (8 Cir. 1965):

> "Section 2255 is the last section of Chapter 153 entitled Habeas Corpus of the United States Code. It is expressly provided in Rule 81(a)(2) that the Rules of Civil Procedure, with exceptions not here important, are not applicable to proceedings in habeas corpus. We think it clear from its history and its purpose that Section 2255 is a 'proceeding in habeas corpus' within the meaning of Rule 81(a)(2), 28 U.S.C.A. Cf. Holiday v. Johnston, 313 U.S. 342, 353, 550, 61 S. Ct. 1015, 85 L.Ed. 1392 (1941), and see United States ex rel. Goldsby v. Harpole, 5 Cir. 249 F.2d 147, 420 (1957), (cert. denied 361 U.S. 850, 80 S. Ct. 109, 4 L.Ed.2d 89)." 205 F. Supp. at 334.

This Court recently considered the applicability of the Federal Rules of Civil Procedure to habeas corpus proceedings, Wilson v. Harris, [11] 378 F.2d 141 (9 Cir. 1967). In that case, the Court was specifically concerned with Rules 26 and 33. Appellant therein, a warden of a state prison, contended that the applicability of Rules 26 and 33 to habeas proceedings was limited by Rule 81(a)(2). In construing Rule 81(a)(2), the Court stated:

> "The Federal Rules of Civil Procedure relating to discovery interrogatories are applicable

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11/ Hereinafter referred to as the Wilson case.

> in habeas proceedings provided both of the following conditions are satisfied: (1) discovery interrogatories in habeas proceedings are not otherwise provided for in statutes of the United States, and (2) the discovery practice in habeas proceedings, prior to the effective date of the Federal Rules of Civil Procedure, conformed to the then discovery practice in actions at law or suits in equity." 378 F.2d at 143.

The Court then found that Appellee had been unable to show that discovery procedure had been used in habeas proceedings prior to September 16, 1938. [12/] It then held that the second condition of Rule 81(a)(2) could only be satisfied by a showing that:

> ". . . prior to September 16, 1938, discovery was actually being used in habeas proceedings, and that such use conformed to the then discovery practices in actions at law or suits in equity." 378 F.2d at 144.

Finding that Appellee had not satisfied this condition, the Court held that the discovery procedure of the two rules was not available in habeas proceedings.

The issues before the Court in the instant case, therefore,

[12/] The date upon which the Federal Rules of Civil Procedure became effective.

are whether Rule 36 is part of the discovery procedure of the Rules and, if so, whether Appellant has satisfied the conditions of Rule 81(a)(2), as construed in the Wilson case. Appellee respectfully submits that Rule 36, like Rules 26 and 33, is part of the discovery procedure and that Appellant has failed to meet the conditions.

The discovery procedure of the Federal Rules is set out in Part V, which is entitled "Depositions and Discovery". Rules 26 through 37, inclusive, are listed under that part. Further, Rule 37, entitled "Refusal to Make Discovery; Consequences", refers to Rule 36. From this statutory scheme, it is apparent that Rule 36 is an integral part of the discovery procedure.

Appellant has never, either in his opening brief or in any of the papers filed before Judge Stephens, cited any instances in which discovery procedure was used in habeas proceedings prior to September 16, 1938. The burden to make such a showing is, and has been, on Appellant and the failure to meet this burden precluded him from making use of the discovery procedure of Rule 36 in the Section 2255 proceeding. Therefore, Appellee was not obligated to reply to Appellant's requests for admissions and the trial court properly denied Appellant's motion.

2. IF APPELLEE WAS OBLIGATED TO REPLY TO APPELLANT'S REQUESTS FOR ADMISSIONS, THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION WAS WITHIN ITS DISCRETION AND APPELLANT'S RIGHTS WERE NOT PREJUDICED BY THE DENIAL.

Appellant contends in his opening brief that the trial court was required to enter summary judgment in his favor when Appellee failed to make a timely response to his requests for admission. Assuming that Appellee was required to respond, it does not follow that the trial court was required to grant Appellant's motion. The trial court in its discretion, had authority to determine that the failure to make a timely response was not by itself sufficient reason to grant summary judgment. This principle was stated in Mossman v. Joseph P. Blitz, Inc., 358 F.2d 686 (2 Cir. 1966):

> "It appears well settled that a failure to respond to a request to admit will permit the District Court to enter summary judgment if the facts as admitted are dispositive. . . . But the District Court is not required to do so. Under compelling circumstances the District Court may allow untimely replies to avoid the admission. . . . [Citations omitted.] Finman [author of The Request for Admissions in Federal Civil Procedure, 71 Yale L. J. 371 (1962)] contends that the admission in the case of an untimely reply should not be

> automatic. [71 Yale L. J. 433, notes 238-9] Finman, however, also submits that there should be limits and we agree. We would impose such limits when the delay has prejudiced the other party." 358 F. 2d at 688.

Appellant's only allegation of prejudice resulting from the trial court's denial of his motion is that the ruling surprised him and thereby precluded him from calling witnesses that he could have called. The record below shows, however, that the trial court denied Appellant's motion for summary judgment, which was based on Appellee's failure to respond to the request for admissions, on May 17, 1967 [C. T. 162], six days prior to the hearing. Additionally, the Pretrial Conference Order and Stipulation, made it clear that the Court would not consider all the requests admitted, and that in the absence of proof on any particular issue, it would find against Appellant [C. T. 168]. 13/ The record also shows that when the hearing began on May 23, 1967, Judge Stephens waited until the Appellant had read the Order before proceeding [R. T. (2) 4].

There is nothing in the Reporter's Transcript to indicate that Appellant, after he had had an opportunity to go over the pretrial Order, indicated to Judge Stephens that he needed more time to prepare for the hearing or that he needed to call additional

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13/ See, in particular, parts I and V of the Order.

witnesses. On the contrary, as illustrated by the following two excerpts, the transcript shows that Judge Stephens gave Appellant ample opportunity to present any evidence that he might have.

> "MR. DAHLSTRUM: Mr. French . . . will have to make a decision now with the backdrop of the advise I have given him as to whether he desires to testify further or not.
>
> "THE COURT: All right, that's up to you, Mr. French. . . .
>
> "THE COURT: Well, now we have all these various things in the pretrial order which you have raised now, and now is your time to be heard on all of them. That's the importance of this. . . . you are representing yourself and have Mr. Dahlstrum's assistance. You will have to make these decisions. So proceed as you see fit." [R. T. (2) 34 and 35].

> "MR. DAHLSTRUM: The petitioner rests.
>
> "MR. TALCOTT: (counsel for Appellee) The Government at this time would move the court . . . .
>
> "THE COURT: Wait a minute. Do you concur with that, Mr. French? You rest now? Go talk to Mr. Dahlstrum, if you wish.
>
> (Whereupon small conference was held.)
>
> "THE PETITIONER: Yes, sir.

"THE COURT: You rest?

"THE PETITIONER: Yes, sir." [R. T. (2) 59].

On this record, it is clear that Appellant's rights were not prejudiced by the refusal of the trial court to deem the matters requested admitted.

B. APPELLANT DID NOT SUSTAIN HIS BURDEN OF PROVING THAT HIS PLEAS OF GUILTY WERE INDUCED BY PROMISES OF LENIENCY BY A GOVERNMENT AGENT.

Appellant contended in the court below that his pleas of guilty were induced by a promise of an agent of the Federal Bureau of Investigation [Special Agent Morneau] that he [Appellant] would only receive a sentence of 10 years in prison, or less. 14/ At the trial, the burden was on Appellant to prove that the agent had made such promise. See United States v. Wiggins, 184 F. Supp. 673, 676 (D. C. D. C. 1960) and Smith v. United States, 339 F. 2d 519, 526 (8 Cir. 1964). The only evidence Appellant offered to support his contention was his own testimony that he entered the guilty pleas so that he could take advantage of the agent's promise

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14/ Appellant admits, however, that prior to accepting his pleas, the trial court questioned him concerning whether any particular sentence had been promised him in exchange for his pleas of guilty and that he denied receiving any such promise [R. T. (2) 56-58].

[R. T. (2) 57-59]. Appellant's testimony was contradicted by Agent Morneau who denied making any promises to the Appellant [R. T. (2) 69].

It is apparent that there was a serious conflict in the testimony of Appellant and Agent Morneau. In ruling on this matter, the trial judge clearly indicated that he chose not to believe Appellant [C. T. 180, particularly page 8 therein]. In a collateral attack upon a judgment, as in other proceedings, credibility of the witnesses is for the trier of facts to decide. See Bloom v. United States, 272 F. 2d 215, 223 (9 Cir. 1959), cert. denied 363 U. S. 803 and McDonald v. Knapp, 373 F. 2d 549, 558 (6 Cir. 1967).

The trial judge's finding is supported by other evidence in the record. It is not contested that the alleged promise was made, if at all, during the interrogation of Appellant by Agent Morneau in the Los Angeles Police Department Building. Agent Morneau knew that the interrogation was being recorded [R. T. (2) 65], but Appellant did not [R. T. (2) 33]. The tape recording of the interrogation was not destroyed until August, 1965 [C. T. 168], more than a year after Appellant had entered the pleas of guilty. Moreover, Appellant stated in his affidavit to his motion for the 2255 hearing that he had informed his attorney, Mr. Byrne, of the Agent's promise to him. Appellant failed to call Mr. Byrne at the 2255 hearing and failed to corroborate his own testimony in any way. The clear inference is that no promise was ever made to Appellant.

It is clear that there was more than sufficient evidence to sustain the trial court's conclusion that no promise of leniency was made to Appellant.

C. APPELLANT DID NOT SUSTAIN HIS BURDEN OF PROVING THAT HIS PLEAS OF GUILTY WERE INDUCED BY THE EXISTENCE OF AN ILLEGALLY OBTAINED SELF-INCRIMINATING STATEMENT.

Appellant contended in the court below that his pleas of guilty were induced either by promises of leniency, supra, or alternatively, were the result of incriminating statements which were obtained from him in violation of his constitutional rights. For Appellant to prevail on this latter ground it is incumbent upon him to show more than the mere existence of illegally obtained evidence in the hands of the Government. See Norris v. Wilson, 378 F.2d 324, 326 (9 Cir. 1967), and Hardee v. Wilson, 363 F.2d 848, 849 (9 Cir. 1966). He must show that the guilty pleas were induced by the existence of the illegally obtained admissions. See Doran v. Wilson, 369 F.2d 505, 507 (9 Cir. 1966).

The only evidence tending to support Appellant's contention was his own testimony that if he had not confessed he would not have entered the pleas [R. T. (2) 30]. This statement is contradicted, however, by other testimony of Appellant that he entered the pleas so that he could take advantage of the alleged

deal [15] [R. T. (2) 57-58]. Moreover, the other evidence in the case indicates that the pleas were not induced by the admissions. The evidence shows that the pleas were not entered until approximately 25 days after the admissions [C. T. 168], and that appellant was represented by retained counsel during this time [C. T. 2 and 27]. The evidence also shows that the appellant discussed his case, including the admissions, "at length" with his counsel [C. T. 27]. After all this, Appellant, with his counsel present, entered the pleas of guilty.

Further, Appellant offered no evidence that his pleas were based on fear of physical or psychological abuse. Rather he testified that he was never physically abused while in custody [R. T. (2) 42], including the time of his illegal interrogation [R. T. (2) 49].

Again, it is clear that there was more than sufficient evidence to sustain the trial court's conclusion that appellant's guilty pleas were not induced by the illegal admissions. See Doran v. Wilson, supra.

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[15] Note, also, that in his supplemental affidavit in support of his 2255 motion, dated August 31, 1966 [C. T. 27] in paragraph 14, Appellant, under oath, states " . . . my pleas of guilty were induced solely upon the assurance and promise of the afore-mentioned agent of the Federal Bureau of Investigation [Special Agent Morneau], that I would receive a prison sentence of ten (10) years or less. "

[illegible]

[illegible]

[illegible]

[illegible]

D. THE OTHER ISSUES RAISED BY APPELLANT WERE ISSUES IN THE TRIAL COURT AND APPELLANT FAILED TO PRESENT ANY EVIDENCE ON THOSE ISSUES.

In addition to urging that the trial court committed three specified errors, the Appellant's opening brief also contends that the trial court erred in its findings that:

(1) Appellant's guilty pleas were not coerced by threats by an Assistant United States Attorney; and

(2) Appellant's sentence was not based on an erroneous pre-sentence report.

Appellant made a number of contentions in the trial court as a basis for setting aside his sentence. All of Appellant's contentions, including the alleged threats by an Assistant United States Attorney and the alleged erroneous pre-sentencing report, were included in the Pretrial Conference Order and Stipulation [C. T. 168]. At the hearing, the burden of proving his contentions was on Appellant. See Smith v. United States, supra. However, Appellant offered absolutely no evidence to show that he was threatened by an Assistant United States Attorney or that the pre-sentence report was erroneous. Appellant clearly failed to meet his burden of proof, and the trial court had no choice but to find

that Appellant's contentions were unfounded. [16]

VI

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

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Assistant U. S. Attorney,
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GEORGE G. RAYBORN,
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Attorneys for Appellee,
United States of America.

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[16] Similarly, Appellant failed to offer any evidence to support his contention that he was mentally incompetent or that he was not adequately represented by counsel. The trial court had no choice but to find that those contentions were also unfounded.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ George G. Rayborn
GEORGE G. RAYBORN